IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEREK S. KRAMER,

Plaintiff,

v.

WILLIAM POLLARD, MICHAEL CLEMENTS, TOM GOZINSKI, DENNIS MOSHER, PETER HUIBREGTSE, MICHAEL DONOVAN and TOM GOZINSKE,

Defendants.

OPINION and ORDER

10-cv-224-slc

Pro se plaintiff Derek Kramer is a prisoner in the custody of the Wisconsin Department of Corrections at the Wisconsin Secure Program Facility. In this lawsuit brought under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, plaintiff raised numerous claims about restrictions on his ability to practice the religion of Odinism. Some claims were dismissed at the pleading stage, others were dismissed at summary judgment. I entered judgment in his favor with respect to one claim. Dkt. 126.

Plaintiff appealed the dismissal of the other claims to the Court of Appeals for the Seventh Circuit, which affirmed in all respects save one: it concluded that the district court should not have dismissed plaintiff's claim that prison officials denied his request for pork at a religious feast on the ground that his complaint and attached documents showed that he had failed to exhaust his administrative remedies. Dkt. 156-1 at 7. The court of appeals remanded the case for further proceedings on that claim.

Because the court dismissed plaintiff's claim on procedural grounds, neither the merits nor the scope of the claim have been addressed by the court. After reviewing plaintiff's second amended complaint, dkt. 15, I understand him to be alleging that defendants Mosher, Donovan, Clements, Pollard, Mohr and Gozinske denied his requests to allow Odinists to have pork at

religious feasts while he was housed at the Green Bay Correctional Institution, in violation of the Free Exercise Clause. 2d Am. Cpt. ¶¶ 71-82, dkt. 15.[1]

As I noted before the appeal, current case law leaves unanswered questions about the proper standard to apply to a free exercise claim brought by a prisoner. For example, it is not clear whether a plaintiff must prove that the defendants placed a "substantial burden" on his exercise of religion, *e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2005), or that the restriction targets the plaintiff's religion for adverse treatment and is not a neutral rule of general applicability, *e.g., Sasnett v. Sullivan*, 91 F.3d 1018, 1020 (7th Cir. 1996). On the appeal in this case, the court did not discuss these issues but simply assumed that the test was whether the restrictions on plaintiff's religious exercise were reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89–91 (1987). *See also Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) (applying *Turner* test without discussing other elements). Accordingly, I will do the same for the purpose of screening, but either side is free to argue at a later date that a different standard should apply.

Under *Turner*, a court considers four factors in determining whether a restriction is reasonable: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. *Turner*, 482 U.S. at 89. *See also O'Lone v. Estate of Shabazz*, 482

[1] Plaintiff cannot bring a claim under RLUIPA because that statute is limited to injunctive relief and any request for injunctive relief now is moot because plaintiff made his request while at GBCI and he has since been transferred to a different prison. Dkt 156-1 at 6-7 ("Without an ongoing controversy about these denials at Boscobel [where plaintiff is housed now], Kramer has no justiciable claim for an injunction merely because a different prison previously denied him that opportunity.").

U.S. 342, 350-51 (1987). Because an assessment under *Turner* requires a district court to evaluate the prison officials' reasons for the restriction, the Court of Appeals for the Seventh Circuit has suggested that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest, *e.g., Ortiz*, 561 F.3d at 669-70; *Lindell v. Frank*, 377 F.3d 655, 658 (7th Cir. 2004), unless it is clear from the complaint and any attachments that the restriction is justified. *Munson v. Gaetz*, 673 F.3d 630, 635 (7th Cir. 2012). Because it is not clear from the allegations in plaintiff's complaint why his request was denied, I will allow him to proceed on this claim.

ORDER

It is ORDERED that

(1) Plaintiff Derek Kramer is GRANTED leave to proceed on his claim that defendants Mosher, Donovan, Clements, Pollard, Mohr and Gozinske denied his request to have an Odinist religious feast that included pork, in violation of the free exercise clause.

(2) The clerk of court is directed to set a scheduling conference.

Entered this 21st day of March, 2013.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge